No. 6167

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

SIDNEY T. BURLEYSON,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT.

This action was brought by the appellee against the United States under and by virtue of the War Risk Insurance Act and the World War Veterans' Act, and amendments and supplements thereto, and is based upon a term policy or certificate of war risk insurance issued under the provisions of the said War Risk Insurance Act approved October 6, 1917, and acts amendatory thereof.

On or about July 30, 1918, at Paris Island, South Carolina, the appellee enlisted in the armed forces of the United States; and he served as a private of the United States Marine Corps until the 10th day of July, 1919, when he was honorably discharged from said Marine Corps, and that during all of said time he was in the active service of said Marine Corps.

That immediately after enlisting in said Marine Corps the appellee made application for insurance under the provisions of Article IV of the War Risk Insurance Act of Congress, and the rules and regulations promulgated by the War Risk Insurance Bureau established by said Act of Congress, in the sum of ten thousand dollars ($10,000); that thereafter there was issued to appellee by said War Risk Insurance Bureau its certificate of appellee's compliance with the War Risk Insurance Act, which entitled the appellee and his beneficiaries to the benefits of said Act; that during the term of appellee's service with the said Navy Department, as aforesaid, there was deducted from his pay for such services by the United States through its proper officers the monthly premiums provided for by said Act of Congress, and the rules and regulations made in pursuance of said Act.

After the appellee commenced his service in the Marine Corps and about the month of November, 1918, he was stricken with influenza at Quantico, Virginia, and was confined in the hospital there for about six weeks. When appellee left the hospital he was ordered back to duty at Quantico, Virginia; thereafter appellee was transferred to the U. S. S. "Albany"; that while appellee was on board the U. S. S. "Albany" en route to Pearl Harbor he was still suffering from the effects of influenza, and was under the care of the Navy physicians on said steamship; that shortly after said steamship arrived in the harbor of Honolulu appellee was stricken with appendicitis, whereupon he was taken to Pearl Harbor about nine miles distant and operated upon for appendicitis;

about twelve days thereafter appellee underwent an operation for the removal of his tonsils; that appellee had not been removed from his hospital cot at any time between operations; that twenty-three days after appellee was discharged from the hospital he was ordered to do work around the barracks; that about one week thereafter appellee was required to drill; to do heavy work, and to be constantly on his feet; that within twelve days thereafter both arches of his feet dropped; that prior to that time the arches of appellee's feet were in normal condition, but within said period of twelve days the arches of his feet dropped clear down—*there were no longer any arches,* and this condition later developed into what is known as *thrombo engiitans obliterans.* This is a chronic affection of the blood vessels, namely: arteries and veins; chiefly, of the hands and feet—the lower extremities from the knees down. It apparently originates as an acute inflammation inside the blood vessels, and ultimately results in *thrombo engiitans obliterans,* and there is no specific cure known; that in the majority of cases of persons suffering from *thrombo engiitans obliterans* amputation is necessary.

The jury on October 18, 1929 rendered its verdict in favor of appellee, and fixed the date of his total and permanent disability from following continuously any substantially gainful occupation from July 10, 1919, and judgment in favor of appellee was thereupon entered.

ARGUMENT.

The appellee contends that the verdict of the jury, and the judgment based thereon are amply sustained by the evidence, and that the judgment should be affirmed.

The United States (defendant) in the court below is seeking a reversal of the judgment upon the following grounds:

(A) That the court erred in denying the motions of the defendant for a nonsuit, and for a directed verdict; (B) That the court erred in giving the instruction set forth in Assignment III; and (C) That the court erred in refusing to give the second paragraph of defendant's proposed instruction No. 8.

We will discuss these grounds in their relative order. The discussion of alleged errors of the court in denying defendant's motions for a nonsuit, and for a directed verdict, will require quite an extensive review of plaintiff's testimony as it appears in the transcript of record.

Sidney T. Burleyson, the plaintiff, testified in substance as follows:

> I was born in Bilen, Mississippi, and am 29 years old. At the time of my enlistment in the Marine Corps I had been on a farm for years except for a period of three months when I worked in a drygoods store. Prior to that I had never worked at anything other than farming. I was 18 years old when I enlisted in the Navy. I enlisted at Memphis, Tennessee, and thereafter I went to Paris Island, South Carolina. I was honorably discharged from the army on July 10, 1919 under the report of a medical survey. After

I commenced my service in the Marine Corps and about the month of November, 1918 I was stricken with influenza at Quantico, Virginia, and was confined in a hospital there about six weeks; thereafter I was sent back to duty at Quantico, Virginia, and shortly thereafter I was transferred to the U. S. S. "Albany." The cold remained with me for awhile, and during the time I was afflicted with influenza I was under the care of the Navy physicians on the steamship "Albany"; I was stricken with appendicitis in the harbor of Honolulu, and was taken to Pearl Harbor where I was operated upon for appendicitis; shortly thereafter my tonsils were removed. I had not been removed from my hospital cot at any time between the operations. I was discharged from the hospital twenty-three days after my last operation, and I was pretty weak when I went to duty. I was ordered back to drill in about a week. After I was ordered back to drill and heavy duty I had terrible pains in my legs, down to my feet, and my arches then dropped down. It was within about twelve days that my arches dropped. At the beginning of the twelve day period my arches were normal and at the end of that period they were down, they dropped clear down; there was no arch; and that condition has existed ever since. My feet and lower limbs at the time swelled so that I could hardly feel my ankle; they swell so big that I cannot stand on them. That condition with regard to my arches and the flatness of my soles has not changed. I was sent to the hospital for about six weeks. I was sent from the hospital on board a ship and a medical survey was held in the Islands, and I was sent back on the ship to Mare Island and discharged there. I went through a

medical survey at the Islands first; a board of doctors commanded that they discharge me from service on disability. I had not made any application for such a survey; that was ordered by my officers. I could not get around at all; if I would move around a little bit it would get so painful that I would almost collapse. That extended up my legs; the swelling went up about half of my legs. I will remove one of my socks so that you may see the condition; that is the general appearance and if I move around much it will be bluer than this; for a long time, while I was working, there were running sores all over my toes; they would swell up and crack open, and matter would come out. When I endeavored to work they would all swell up; my toes would crack open and bleed; it got so painful that I could not stand. I never worked constantly. The skin would break open; it would swell and break open, and the skin would come off, and it would be raw. It disclosed the red tissues underneath; that has been the result whenever I have endeavored to remain on my feet for any length of time. *Since my discharge from the Marine Corps I have endeavored to work; I had to work; I had no other way of living.* After I came out of the service I first attempted to work as a clerk for the Government at Mare Island. I handled containers. When I was required to be on my feet they got so badly swelled—I had a mighty fine boss, and he would let me off quite often, and I would go home and lift my foot until I got the blood back down again, I put them on pillows and got relief that way. I was acting under a physician's instructions when I kept my feet lifted. *The physicians told me I should keep off my feet, but I had to work to make a living.*

There has been no time since my discharge when I have been able to work continuously and without interruption. I have never worked over six weeks without having a day off; it would get so bad I would have to be off. At other times I would have a greater length of time off. I had to finally quit work there, because my feet got swelling so badly I could not get around at all. I had to lay off about a month and it did not do any good. I went back, but I could not stand on my feet; it required me to be on my feet quite a bit. I next worked for the Southern Pacific. I started to work as cashier. I had a stool that I sat on quite a bit. I think I worked there about two weeks. I laid off about three weeks before I went to work again because my feet were in such bad condition that I could not get around. I have attempted to work from time to time. I have never been able to continue in any of these positions; my physical condition always compelled me to quit. *It has been over a year now since I have attempted to do any work at all.* From time to time while I was in these various places attempting to work, I have had physicians attending me. *I hired them and paid them myself.* They were giving me treatments during this period of time. They relieved me while I was off my feet, but when I went back to work again the same thing would come back again. The only time that I get any physical relief is while I am lying down and keeping my feet elevated to keep the blood down. I have been advised by the physicians that in order to get relief I must keep off my feet and keep them elevated most of the time. I have endeavored to follow that advice every day. I have had treatment in the Government hospital at Palo Alto

twice since my discharge. I went there in July of last year. I was there about six weeks, and then I was out for about seventeen days and went back, a little over six months. During the last six weeks I was there they were putting iodine on my feet. It did not help me any that I could see. Most of the time I was in bed. The first time I was there my feet were given some treatment, and then they recommended an operation; then when I went back they did not operate; they put my feet in very tight plaster casts up to here. (Indicating.) I had to have them taken off in about four weeks as they got so painful. There was no improvement in my limbs. I could not walk then at all until I had those taken off. After I left the base hospital the second time I came to the Herald Hotel. I was there about twenty-five days, and about the latter part of March I went into the Letterman Hospital. The attending surgeon was Major Murrell; he was the superior. I was under treatment there about four months. I was a bed patient. I came out June 28; my condition had not changed at all that I could see, but I got out and walked around a little bit they they were swelling again, so I stayed around the Hotel Herald for a day. Since I had these casts taken off my feet I have been using double crutches. *I have not been able to remain at work, however light, continuously. I do not know of any form of work at which I am able to remain.*

On cross-examination the witness testified in substance as follows:

I made application for the relief mentioned in my policy of War Risk Insurance. At the time I filed my application for compensation, one of

the members of the Board that was there when the application was made out—I asked him about the benefits under that, and he said, "No, you are not entitled to any."

Mr. McNab. I neglected to ask one question:

Q. At the time of your discharge from the Army, did you cease paying your premiums on your policy or did you continue to pay them?

A. I paid them for about six or seven months?

Q. After your final discharge from the Army?

A. Yes, sir.

Q. And during all that period of time you were afflicted as you now are?

A. Yes.

Mr. Van Der Zee. Q. You say you made a claim for the insurance benefits?

A. Yes, sir.

The date I applied for compensation was December 24, 1926. I asked at the same time a member of the Board about insurance benefits, and he said you would have to be totally disabled at the time before you could get it; that is the first time that I made any claim of any character for compensation insurance or any other relief from the Government; the man on the rating board turned me down. I don't know his name; he was on Rating Board No. 3. I have never received any communication from the Director of the United States Veterans' Bureau denying any claim of mine for War Risk Insurance benefits. I was discharged from the service on July 10, 1919. I first went to work, after leaving the service, for the Government at Mare Island. They did not give me an examination for that position; just went over you in a way. It was a Civil Service position. They just examined my heart. I was given a clerical position in the Supply

Department. I was container recorder. I had to handle the serial numbers on gasoline tanks and things like that. I was known as a store man. All my work was clerical. I was at the Navy Yard on those various jobs during all of 1919 from July, 1919, to August, 1920. After I left that position I was next employed with the Southern Pacific at Tracy. I was cashier in the restaurant. I did not go there directly from my Mare Island employment. I got a thirty-day leave of absence, they granted it to us at the end of the year, so I did not work the thirty days. I was on the Government pay-roll but I was on vacation. I was off a month there. I was treating myself there for a month. I worked for two weeks and laid off, for about a month, and I worked then for about five or six months. I was not working every day. A lot of that time I was off. I was not on that job all of the time between August, 1920 and November, 1922. I was only there about fourteen days, first. After fourteen days, I was off for awhile and went to Yuma, Arizona, for the Southern Pacific. I worked in the clubhouse as a clerk. I stayed at that employment about five or six months when I quit. I was off a number of times during that period of time. I recall an examination by Dr. Magnin of the Southern Pacific on July 6, 1923. I went in there, but I did not go to work. I went up to Lake Tahoe instead. I don't remember that the doctor asked me if I had any diseases of the feet. That is my signature to photostatic copy purporting to be a physical test record. Referring to the balance of the report I recall now a second physical examination. I did not go to work; there were two physical examinations given me by the Southern Pacific Company. My

last employment by this company was in 1923, I think. My salary was $90.00 a month and found, I think. I was next employed as a hotel clerk at the Merritt Hotel in Oakland for about a month and a half. After that I worked for the Emporium in San Francisco; I was off a number of times during that time. I was not working consecutively. I recall working in the Hotel Del Monte in Monterey for about two months. I was employed in the storeroom there. The first part of the year 1925 I went to work for the Fox Hotel, in Taft, California. I worked there for something like a year and a half, but I did not work steady; I was off a number of times during that time. I started at a salary of $125.00; that did not include my board. I was night clerk. I was feeling so bad I laid off for a long time. I was off for a month, then I went to work as a hotel clerk at Tahoe Tavern. I worked there about three months until October 26, then the season closed, but I could have gone back there, but the doctor told me if I came back there in winter time I would be frostbitten and I would lose my legs. I next went to work for the Whitcomb Hotel in San Francisco as a clerk. I worked there about five weeks. My salary was $90.00 and meals. I got so bad, my feet began to swell, and I could not stay there and I quit. I was off for a month or six weeks. I took a rest and went to the Granada Hotel. I was there just a short time, and then I laid off; my feet got so bad I could not stand it and went to work at the Worth Hotel. I got a straight salary of $125 a month at this hotel. I worked there a little over a year. I left my employment at the Worth Hotel the latter part of June; somewhere thereabouts, or May; but I was in the Palo Alto

hospital in August. I went to night school for awhile during the time I was working at the Emporium. My attendance was irregular. While I was working at the Worth Hotel I went every day for almost a year, taking treatments, as the records will show—I took treatments down at the Veterans' Bureau for almost a year, for over a year, nearly every day. They were light treatments for the broken skin and sores. Dr. Jeppel and Dr. Casey gave them to me. They did not make a thorough examination. They sent me to Dr. Alderson and Wade, and they told me I should be in the hospital. I called up the Veterans' Bureau and told them, and I went down there, and they sent me to Palo Alto Hospital. I did not at any time before the year 1926 make any claim for disability compensation. I signed a waiver—I would like to explain that if you do not mind. When I left the service in 1919 I had to sign a waiver, and so up to that time I didn't know whether I had any claim or not, but I got so bad, and I saw one of the veterans, and he said: "Why don't you go down to the Bureau?" and so I went down to the Veterans' Bureau, and they told me: "You should have come in before." I would have gone there before, but I didn't think I had any claim. He told me that waiver did not mean anything. I do not recall how that waiver read. I only mention that because this other veteran told me what I have just related. At any rate, I made no claim upon the United States Government or did not go to the Veterans' Bureau or any other branch of the Government for relief until 1926.

On redirect examination the witness testified in substance as follows:

When I left the service, before I got my discharge at Mare Island I had to sign this waiver of any claim. I read part of it, and it said: "I waive all claims for treatment in the hospital and for any compensation." I thought that ended my claim. I was first informed that my signature on such a waiver amounted to nothing on December 13, 1926. I went the following day to the Veterans' Bureau. The Bureau did tell me that they would not grant me disability. I was orally informed to that effect by one of the members of the Rating Board number three here in San Francisco. I have never been granted insurance on the basis of total disability. After being so informed, I commenced this suit. A number of places have been mentioned here where I have been employed, seven or eight, my employment at each one terminated because I would get so bad I had to quit and take a rest. I would never advise the people where I was employed of my condition because I figured that would hurt my getting another position after I got out. When I left their employ finally I had no dispute with any of them, *it was just on account of my physical condition.* In these night clerk jobs I was not required to be on my feet very much. For instance, taking the Hotel Worth, my hours there were from eleven at night to seven in the morning. I had very little to do there. I had a big wicker chair and I used to sit with my feet up like this most all night long, because the doctors had advised me to do that, to keep off of them as much as I possibly could. I sometimes wrapped a blanket around me. I went to the Veterans' Bureau for about a year for treatment. I did not get any better. I never had my feet examined by any Southern Pacific official. *When I went*

looking for a job, I was not telling them of my trouble with my feet; if I had I would not get a job. I never occupied a position as rivet heater. I do not know anything about rivet heating, nor do I know anything about working as a machinist. I was working as a clerk all the time I was there. I am a resident of the City and County of San Francisco, and have been ever since my discharge from the service. I am a United States citizen.

Mr. Burleyson, being recalled in his own behalf, testified as follows:

Mr. McNab. Q. Mr. Burleyson, this morning you were asked concerning making application or demand on the Veterans' Bureau for your War Risk Insurance. Did you make such a demand?

A. Yes, sir.

The Witness. That was about that date that I discussed this morning concerning some other demand that was filed; that was at San Francisco. I told them I was unable to do any work and asked if I was entitled to ask for the benefits of my War Risk Insurance, and they told me it was impossible to obtain it. They never changed that ruling, and that is why I brought this suit. (Tr. p. 37.)

On cross-examination the witness testified:

That he made a demand for his War Risk Insurance payments: that he asked a member of the Rating Board of the Veterans' Bureau; that he did not remember the names of any of those men; that he did not make any written application for those payments; that he never received from the Rating Board or anybody else a written statement of their denial of his claim for insurance

benefits; that he asked them, but they told him it was no use. (Tr. pp. 37-38.)

We have at the risk of possible criticism stated at length the substance of plaintiff's testimony. We have done this, so as to give the court a clear picture of plaintiff's condition; to show the efforts and struggles that plaintiff made to work that he might live, notwithstanding that he was suffering from an incurable disease with which he became afflicted while in the service of the Army; and to show that by reason of his disability he was forced to give up position after position, and that he can no longer do any work—no matter how light. The plaintiff *had* to work. He felt that he could not stop. He had to live. We quote his exact words:

> "Since my discharge from the Marine Corps I have endeavored to work; I had to work; I had no other way of living." (Tr. p. 14.)

A graphic account of plaintiff's condition is given by Dr. William Cooper Eidenmuller, an eminent physician and surgeon of San Francisco, and which will be found on pages 27 to 36 inclusive of the transcript.

We submit that when the testimony of this distinguished surgeon is considered in connection with the testimony of the plaintiff; with the report of the physical examination of the plaintiff conducted by Major Marietta, of the Letterman Hospital; the diagnosis of Dr. M. T. Maynard, at the Veterans' Bureau; and the diagnosis of Dr. C. L. Hoy, major in the Marine Corps, at the Presidio, it will clearly appear

that there was substantial evidence adduced to show that the plaintiff became totally and permanently disabled while he was in the service of the Army, and while the policy of War Risk Insurance was in force, and therefore the judgment of the court must be upheld. The most that can be said for the contention of the Government is, that the evidence was conflicting, but we submit that where there is substantial evidence to uphold the judgment, it cannot be disturbed.

The appellee testified that

> *"when I went looking for a job, I was not telling them of my trouble with my feet; if I had I would not get a job."* (Tr. p. 26.)

Counsel for the Government insinuate that the testimony of Dr. Eidenmuller is entitled to little weight because they say that the doctor first saw the plaintiff in August, 1927, more than seven years after the lapse of the policy; that he was not an expert on the disease of *thrombo engiitans obliterans;* that he had never treated such a case before; that his diagnosis as well as the treatment he prescribed were based upon the medical history volunteered by plaintiff, and he ventured no opinion as to when the disability commenced.

The fact that nine years had elapsed between the time that plaintiff became disabled in the service of the United States and the time he consulted Dr. Eidenmuller is the strongest kind of proof that the disability of the plaintiff was not of a temporary nature, but permanent and total in character. A few excerpts from the testimony of Dr. Eidenmuller will be illuminating:

"In my examination into the medical history of Mr. Burleyson, I considered certain conditions that he suffered from, that I looked upon as perhaps the most predisposed to leading to this condition. They were influenza, acute appendicitis, chronic tonsilitis, and the condition of the feet known as flat feet. To my knowledge none of the various causes I have mentioned that have been discussed by branches of the medical industry,—tobacco or intoxicants or syphilis, existed in Mr. Burleyson. *Whatever the cause, it is my opinion that he has the disease. There is not any specific cure known.*" * * * At the same time that I was attending Mr. Burleyson for the condition that he has, I was attending another employee of the same hotel with a condition nearer to Mr. Burleyson's condition than anything else in medical annals, called "raynos" and is so similar that up to twenty-five years ago in this country they were classed under the same general head, and in making the diagnosis in this other case I was able to become enlightened considerably as to the condition that Mr. Burleyson is in, and the net result of those two diseases is about the same; in fact, the other man has since lost both feet and legs below the knees. I prescribed for Mr. Burleyson at that time treatment that could be classed under the head of—general head of physiotherapy. I did not at any time prescribe amputation. No; I did not state my opinion to be that amputation is absolutely necessary in this case; I said this morning that in a serious matter of that kind I always leave the decision to the patient. As far as amputation is concerned the operation would tend to remove from the rest of the body the affected parts, and if it did that he would no longer have that condition, and then,

unless it extended, he would be free from the suffering he is now enduring. During part of the time at least that he was under my care he was also under the care of the Government in hospitals and receiving treatment, so I was not the physician to the full extent I could have him solely in my care. I did not say that amputation was advisable; *I said that a majority of these cases come to amputation,* and further I will say at this time that amputation be performed. This disease is not a result of what is known commonly as flat feet; the specific cause, as I testified this morning is not known, as far as I know, and as far as the authorities know. This man has flat feet. That can be looked upon as a predisposing cause in that it would doubtless incorporate some features that are affected by this condition. * * * To my knowledge there is not any particular specialist in the treatment of this disease as a specialist. It is apparently rather a rare form of disease. I have studied quite a few authorities that are available on the subject. I have never met anybody in the profession to be a specialist in the treatment of this particular disease. When I say that I have not thus far advised amputation *I do not mean to say that amputation may not ultimately be necessary. In the event that gangrene sets in instant amputation would be absolutely necessary to save life. The other case which I described as a very similar condition has required it; the amputation of both limbs below the knees* * * *!" (Tr. pp. 34-35.)

The testimony is undisputed that appellee contracted influenza; that he was operated upon for acute appendicitis; that his tonsils were removed; that the

arches of his feet dropped; and that all this occurred while appellee was in the service of the Army, and that prior to his enlistment appellee was in sound physical health. The appellee could not have passed the rigid physical examination that he did pass, and been taken into the Marine Corps if he had been in unsound health.

Section 200 of the World War Veterans' Act, so far as material, is as follows:

> "That for the purpose of this Act every * * * member employed in the active service who was discharged * * * prior to July 2, 1921 * * * shall be conclusively held and taken to have been in sound condition when examined, accepted and enrolled for service except as to defects, disorders or infirmities made of record in any manner by proper authorities of the United States at the time of or prior to inception of actual service, to the extent of which any such defect, disorder or infirmity was so made of record."

Brandaw v. United States, 35 Fed. (2nd) 181.

> "As permanency of any condition (here total disability) involves the element of time the event of its continuance during the passage of time is competent and cogent evidence."

McGovern v. United States, 294 Fed. 108 (D. C.); affirmed, *U. S. v. McGovern,* 299 Fed. 302.

The Government is forced to concede that the examination by Dr. Maynard, a government consulting physician, dated October 13, 1928, gives a diagnosis of "circulatory disturbance strongly suggestive of *thrombo engiitis obliterans* (Brief of Appellant, p. 5

and stipulation on file herein incorporating this exhibit in the record), and furthermore, that Major S. U. Marietta, a Government doctor, examined plaintiff on March 29, 1929, and gave a diagnosis of *thrombo engiitis obliterans* both feet, legs, moderately severe (same stipulation, Brief for Appellant, p. 5), and that Dr. Wallace, a private physician examined plaintiff in 1926 and 1928, and gave a diagnosis of chronic eczema of the feet and toes, and fallen arches. (Similar stipulation on file herein incorporating physician's report in record.)

The evidence indisputably and without conflict showed that shortly after the appellee was stricken with influenza, he was operated upon for acute appendicitis; that his tonsils were removed; and that within a period of thirty days appellee was, to use his own language:

> "ordered back to drill and heavy duty. I had terrible pains in my legs, down to my feet, and my arches dropped down then. It was within about twelve days that my arches dropped; at the beginning of the twelve day period my arches were normal and at the end of that period they were down, they dropped clear down, there was no arch; that condition has existed ever since. * * *" (Tr. p. 12.)

Can there be any doubt that the attack of influenza; the operation for acute appendicitis; the removal of appellee's tonsils, and that the appellee within thirty days after he left the hospital was forced to drill, and to do heavy duty, resulted in the incurable disease, *thrombo engiitans obliterans* with which appellee is afflicted? We submit that there can be none.

The evidence is undisputed that the appellee paid the premiums on his War Risk Insurance policy for nearly six months after his honorable discharge from the Army; and the evidence is very clear that the appellee became permanently and totally disabled while he was in the service of the Army, and before his policy of insurance lapsed.

The evidence is undisputed that the appellee is unable by reason of his condition to remain at any form of work—however light. (Tr. pp. 17-18.)

Counsel contend that the Government's motions for nonsuit and directed verdict should have been granted because of the alleged failure of plaintiff to present any evidence of disagreement with the Veterans' Bureau.

The answer to this seems obvious and conclusive. The Government with all its files available and the entire Veterans' Bureau at hand closed its case *without offering any evidence whatever to refute the testimony of the plaintiff that he had made the application and that it had been denied.* How could the Government ask a directed verdict in its favor when, with all of its evidence available, it failed to produce any testimony whatever on the subject, and the only showing in the record is that the dispute exists? *The Government failed to plead it or raise the question until the plaintiff had completed his case. The fact that the claim was disputed was the obvious fact on the trial.* An entire afternoon was spent by the Government in an attempt to show that the claim to total disability had been disapproved. To say that there was no showing of disagreement while the Gov-

ernment was actually engaged in showing the disagreement and attempting to justify its position is anomalous to say the least. The Government insists that there was no proof of a demand upon the Director. The undisputed evidence shows that there was a demand upon Officers of the Veterans' Bureau. That Bureau is composed of Directors. What evidence is there to show that such demand was not passed upon by the Director? None. As a matter of fact the testimony is that it was denied, and the Government was content to introduce no evidence to show that it was not done.

The plaintiff made it very clear why he had not made a demand before 1926. When he left the service of the Army plaintiff was compelled to sign a waiver, and it was not until a veteran told him that the waiver did not mean anything that he went to the Veterans' Bureau. (Tr. pp. 24-25.)

The plaintiff made a demand for his insurance benefits, but he was told by the Bureau that it was impossible for him to obtain them. The Bureau never changed this ruling, and plaintiff was compelled to bring suit. If he had not commenced his action when he did the action would have been barred by the statute of limitations.

It ill becomes this great Government to quibble, and attempt to evade the payment of just compensation on the plea that plaintiff made no written application for insurance benefits, and he had not received a cold, formal letter of denial of benefits.

> "* * * The policy is a contract, in the consideration of which every reasonable presumption

must be indulged in behalf of the plaintiff. He was an enlisted man, and the whole scheme of war risk insurance was designed to benefit men who thus served, and who, from any cause during the period of their service, became disabled. Great liberality of construction must therefore be indulged. If this plaintiff can be said to have become totally disabled during his service, even though the cause of it may be traced back to remote conditions, with which his service had nothing to do, I think he should recover a judgment here. The very purpose of the insurance was to protect the service man against such a misfortune. * * *"

Starnes v. United States, 13 Fed. (2nd) at page 213.

The law as it existed when the appellee made application for insurance benefits under his policy of war risk insurance, and when said application was denied, and also when this action was commenced did not require said application or the denial thereof to be in writing.

The essential thing is the *fact* of disagreement.

The cases of *Manke v. U. S.* and *Condee v. U. S.,* 38 Fed. (2nd) 624, and *Berntsen v. U. S.,* 41 Fed. (2nd) 663, cited by counsel, do not hold that a disagreement cannot exist unless it is expressed in terms of writing. In those cases the court said:

"They not only failed to prove that a disagreement existed, but it is in effect conceded that in fact there had been no disagreement. * * *"

The court in the case of *Berntsen v. U. S.,* supra, held that the claim presented to the court for adjudica-

tion *had never been presented to the Bureau*—not that the claim and rejection had to be in writing.

THE EVIDENCE SHOWS THAT PLAINTIFF BECAME PERMANENTLY AND TOTALLY DISABLED WHILE IN THE ARMY, AND THAT THIS DISABILITY OCCURRED WHILE HIS POLICY OF INSURANCE WAS IN FORCE.

We believe that we have sufficiently shown by the record that the plaintiff became permanently and totally disabled while he was a private of the Marine Corps, and before his policy of insurance lapsed. The evidence without conflict showed that the appellee had to work that he might live. Self-preservation is the first law of nature, and in obedience to this law, the appellee worked in position after position only to be forced to give them all up because of his incurable disability.

The evidence showed that the appellee has been unable to find any work—no matter how light—that he can do. And the evidence showed that when plaintiff did work he had to sit in a chair or on a stool, and keep his feet elevated so that he might get relief from the terrible pain and suffering that he would experience if he stood on his feet.

In the case of *United States v. Sligh,* 31 Fed. (2nd) 736, this court said:

> "* * * The question remains whether we should disturb the conclusion of the court below that the plaintiff was totally and permanently disabled during the period for which recovery was sought. While it is true that, when the case was formerly before us, it was observed in the opinion of this

court that force was found in the contention that the plaintiff was not totally and permanently disabled, yet upon a reconsideration of the testimony and in view of the regulations of the bureau and the purpose and intent of the insurance contract, we are not convinced that the conclusion reached by the court below was erroneous. There was testimony of competent physicians as to the plaintiff's disability. Dr. Wylie testified that the plaintiff had a well-advanced case of pulmonary tuberculosis. He said: 'At the present time it would be impossible for him to do any manual labor. I am positive that in the future he will not be able to follow any gainful occupation. Taking the history of the case into consideration I am of the opinion that Mr. Sligh has been unable to do any work since September, 1918. It is very injurious for any man to work with active pulmonary consumption. *It is physically possible for a man to work until he drops dead, but it is very injurious to the health and should not be done.*' Dr. Sweek testified: '* * * It has been inadvisable for Mr. Sligh to do any work since I have known him. Mr. Sligh will never be able to work again. He will not live very long. This man has been disabled since he walked out of the service, and always will be. There has never been a time, from the time he had pneumonia, that he has been inactive. Any man with an active pulmonary tuberculosis is totally disabled.' And the doctor expressed his opinion that the plaintiff has been totally and permanently disabled since prior to his discharge from the army in December, 1918. No reason is suggested why the trial court should not have relied upon this testimony. It is not necessarily contradicted by the plaintiff's own testimony as to the

work he did. The term 'total and permanent disability' obviously does not mean that there must be proof of absolute incapacity to do any work at all. *It is enough if there is such impairment of capacity as to render it impossible for the disabled person to follow continuously any substantially gainful occupation. These policies and the statutes applicable to the same are entitled to a liberal construction in favor of the soldier.* United States v. Law (C. C. A.), 299 Fed. 61 (reversed on other ground 266 U. S. 494, 45 S. Ct. 175, 69 L. Ed. 401); United States v. Cox (C. C. A.) 24 Fed. 944."

And in the concurring opinion Judge Dietrich said:

"Had appellee put aside concern for the immediate necessities of his family, and, yielding to the advice of a conservative physician, wholly refrained from work, it may be doubted whether any question would have been raised of his right to receive the insurance. * * *"

Dr. Eidenmuller testified that

"in my opinion the appellee is in a condition to do no work, except to take care of his own feet and legs. If he does do any work beyond simply taking care of himself he may be jeopardizing the length of time he is going to keep his feet and legs or his life. Gangrene occurs in the majority of cases and amputation is the only relief. In my opinion his present trouble will continue throughout the remainder of his life." (Tr. of Record, p. 33.)

Of course, the appellee might have struggled on until he dropped dead, but it can hardly be said that the Act required him to do this.

We submit that the reasoning in the case of *U. S. v. Sligh,* supra, fits this case, and justifies an affirmance of the judgment herein.

In the case of *United States v. Acker,* 35 Fed. (2nd) at page 648 the U. S. C. A. for the 5th Circuit said:

> "For a disability to be total within the meaning of the above referred to provision it is not necessary that the insured's condition be such as to render it impossible for him to engage in any substantial gainful occupation. It is enough that his condition be such as to render him unable, in the exercise of ordinary care and prudence, to engage continuously in any substantially gainful employment. Appellee's disability was not kept from being total by his intermittent business activities, if, without the exercise of ordinary care or prudence, they were engaged in at the risk of substantially aggravating the ailment with which he was afflicted. Metropolitan Life Ins. Co. v. Bovello, 56 App. D. C. 275, 12 F. (2d) 810, 51 A. L. R. 1040; United States v. Sligh (C. C. A.), 31 F. (2nd) 735; New York Life Ins. Co. v. McLean, 218 Ala. 401, 118 So. 753. * * *"

Counsel mainly rely upon the case of *United States v. Barker,* 36 Fed. (2nd) 556, that plaintiff was not totally disabled, and prevented from following continuously any substantially gainful occupation.

In that case Dr. Wheeler testified:

> "At the time he left my care there was not, as I remember, anything in his condition at that

time as I found it, which would have precluded him from following continuously many substantially gainful occupations. Of course, the time he left my hospital he was recently out of the hospital and a man after an operation of this kind takes a little time to get his strength. But I remember no condition which would interfere with his working. * * *"

U. S. v. Barker, supra, page 559.

Dr. Eidenmuller, as before recited, testified:

"in my opinion the appellee is in a condition to do *no work,* except to take care of his own feet and legs. If he does do any work beyond simply taking care of himself he may be jeopardizing the length of time he is going to keep his feet and legs or his life. Gangrene occurs in the majority of cases and amputation is the only relief. *In my opinion his present trouble will continue throughout the remainder of his life."*

We submit that in the light of the evidence and the authorities cited, that the motions for nonsuit and a directed verdict were properly denied; that the court was justified in giving plaintiff's instruction (Assignment of Error III, Tr. p. 95), and in refusing to give the second paragraph of Defendant's Proposed Instruction No. 8. (Tr. p. 86.)

And in conclusion we further submit that common justice demands that the judgment should be affirmed; that the evidence shows that the appellee became totally disabled while in the service of the Army, and before his insurance lapsed; that he is suffering from an incurable disease, *thrombo engiitans obliterans;*

that this will continue throughout his life; and that the appellee is no longer able to do any work.

Dated, San Francisco,
September 24, 1930.

Respectfully submitted,

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